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IN THE

Supreme Court of the United States

October Term, 1965

No. 628

William R. Lichota, and
Edith F. Lichota, Petitioners

vs

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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-vs-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cases on September 30, 1965.

OPINION BELOW

The District Court rendered no written opinion.

The opinion of the Court of Appeals for the Sixth Circuit (Appendix, p. 1a, et seq.) has not yet been reported. The Petition for Rehearing was denied without opinion.

JURISDICTION

Separate appeals of the petitioners were consolidated for argument and briefing, and a single opinion was entered by the Court of Appeals for the Sixth Circuit on September 30, 1965; a copy thereof is appended to this Petition in the Appendix at pages 1a-19a (Exhibit A). A timely Petition for Rehearing was denied on November 11, 1965. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

The petitioners are husband and wife, and they are both lawyers. At their trial for alleged mail fraud and conspiracy to commit mail fraud, they relied upon a written Power of Attorney from the complaining witness authorizing them to perform the acts charged by the government to have been fraudulent. The questions presented are:

1. Whether it is not an illegal and unwarranted extension of the Mail Fraud Statute (Appendix, p 20a), contrary to all cases construing it, to find that petitioners committed mail fraud within the purview of the statute, when the allegedly fraudulent conduct consisted of providing products and services over a two-year period, in the manner in which they had been ordered, to the satisfaction and substantial benefit of the party which had ordered the services and had signed a Power of Attorney authorizing the petitioners to so provide them?

2. Whether petitioners' constitutional right to make a contract authorizing them to adjust quantities, in the sole discretion of one of them, includes the right to rely upon

such contract as an absolute defense to charges of fraud allegedly committed by them when they did adjust quantities and identified their invoices with the quantity from which the adjustment was made, rather than the quantity finally delivered?

3. Whether it was plain error, requiring reversal on appeal, for the District Attorney to argue to the jury that the said Power of Attorney was a forgery, when there was no evidence to support this statement?

4. Whether it was plain error, requiring reversal on appeal; and a denial of the petitioners' constitutional right to a trial by jury; and an improper shifting of the burden of proof in a criminal matter, for the court to charge the jury that an over-statement of quantity was sufficient to form a basis for conviction, when the cornerstone of the petitioners' defense was a justification of the admitted difference in the quantity stated and the quantity delivered?

5. Whether a mere showing of the existence of other, unrelated business relationships between the petitioners and the complaining witness was properly admitted as evidence of a pattern of "collateral offenses" when there was no showing that these other relationships were either fraudulent or improper?

6. Whether it was unconstitutional, and otherwise improper, to admit into evidence, over objection, testimony of a private investigator whose investigation was made *after* the conspiracy, if any, had terminated, and which testimony was based upon hearsay and records not offered; tended to establish a crime for which petitioners

were not indicted; and included an alleged admission by W. R. Lichota which, if made, was made at a time the government knew he was not competent to make it?

7. Whether it was plain error, requiring reversal on appeal, for the District Attorney to uge upon the jury the untruthful assertions that registration statements are prepared by filling out printed forms and are good forever, and Power of Attorney must be recorded to be valid, when the value of services in preparing these registration statements, and the validity of the Power of Attorney, were vital elements in the petitioners' defense?

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of the Fifth and Sixth Amendments to the United States Constitution, Sections 371 and 1341 of Title 18, U.S.C., and Rule 52(b) of the Federal Rules of Criminal Procedure, Title 18, U.S.C., are set forth in the Appendix at pages 20a-21a.

STATEMENT

On May 11, 1959, Pure Milk Association, hereinafter called PMA, executed and delivered to the petitioners a Power of Attorney which is set forth as a footnote to the opinion of the Court of Appeals (Appendix, p. 5a-6a). The signatures on this Power of Attorney were identified by two of the men who had signed it, so the Notary was not called. (Pet. for Reh., p 5) Both men declared they did not recall the document, but Mr. Bolcum is quite elderly, and Mr. McWilliams' memory was elsewhere demonstrated to be unreliable (App. to Brief of Def.-App., pp 47a, 275a).

This Power of Attorney authorized petitioner, W. R. Lichota, to engage Artlines of Bedford to perform a variety of services in connection with the Loan Certificate Program of PMA and to adjust quantities and quality in his full discretion. It mentioned E. F. Lichota by name and specified certain services to be provided by Elton Investment Company. Both companies were owned by Mr. Lichota's mother and operated by E. F. Lichota, whose name also appeared in other authorizing documents. (Appendix, p 8a) A copy of the Power of Attorney was introduced into evidence because the original could not be found for the trial.

For a period of two years, Artlines of Bedford, operated by E. F. Lichota, furnished advertising literature, brochures and Loan Certificates, and the registration statements and prospectuses required to sell these securities, to PMA, all as authorized by the Power of Attorney, and all as part of the Loan Certificate Program. Concurrently, E. F. Lichota, who is both an attorney and a commercial artist, registered a number of trademarks for PMA, acting under the firm name of Hellman and Connors. She used additional professional names to give the appearance of a larger operation than one person, and to add a masculine name to the work and correspondence.

Relying on the Power of Attorney, W. R. Lichota adjusted quantities and quality on orders placed with Artlines to reflect changing circumstances and to include other services rendered by E. F. Lichota. There was never any charge for additional services to PMA by Artlines, other than as they were absorbed into the invoices for products delivered. These charges included artwork, copy preparation, interviews, travel, research, orders received and cancelled, several registration statements as to which PMA made changes,

and other registration statements necessary to amend existing registrations. To keep ordering records straight at both ends, the quantity of the original order remained constant. In every instance, the quantity delivered was less than the amount of the original order because of changes requested and supplemental or collateral services required. There was no showing that anyone else had performed the work, and no denial that it had been performed or that PMA had received it. There was no evidence to indicate that the amounts received by petitioners represented over-payment for services actually rendered to PMA, and it is apparent that PMA benefitted greatly from these services. (App. to Brief of Def.-App., pp 288a, 289a) A commensurate amount of work was not available elsewhere at the same cost.

The three inaccurate invoices which were the subjects of the three counts of the indictment concerned deliveries of Loan Certificates which were similarly treated. Petitioners introduced copies of registration documents prepared by E. F. Lichota, the charges for which were included in those invoices. The prosecutor insisted that E. F. Lichota was incapable of preparing the documents, and that if she had, the charges made would have been inadequate. Ironically, underpricing the services as an accommodation led to the conclusion that a fraudulent deception had been intended and practiced.

During the period of W. R. Lichota's employment with PMA, five hundred blank Loan Certificates disappeared. The disappearance was known to PMA for at least two years, and was known to the government at the time of the Indictment and Bill of Particulars in this action. In March of 1961, a private investigator was called in by PMA to examine its Loan Certificate Program. The Association

claimed at that time, and at the trial, that it was unaware of the relationship between the petitioners and of their connection with the various businesses which had been supplying the services for this Program. At a meeting with the investgator, John Kennedy, W. R. Lichota is said to have made the statement that he took the Loan Certificates as his "Ace in the Hole"; Mr. Lichota admits that he offered to replace them, and, as they were blank, he could easily have done so.

Within two weeks after that meeting, Mr. Lichota was in the Summit County Receiving Hospital in Cuyahoga Falls, Ohio, the victim of violent paranoiac delusions. (Pet. for Reh. p 8). He was then in the care and custody of the Veterans' Administration for several months. This fact was known to the prosecution; yet it relied for a conviction, not upon the facts, but upon the alleged admission for which the government knew he could not have been responsible.

At their trial, over objection, the District Court admitted the testimony of John Kennedy, although it included, and was based upon, hearsay, brought into issue a crime of which petitioners were not accused, and involved an admission relative to such different crime, which admission was made after the conspiracy, if any, had terminated, and at a time when the petitioner was not responsible for it. Also over objection, the Court admitted extensive evidence of the existence of other business relationships between the petitioners and PMA without any direct proof to support the conclusion that they were improper. The Prosecutor engaged in a course of improper comments calculated to deceive the jury and denounced the Power of Attorney as a forgery without a shred of evidence to support such a conclusion. (App. to Brief of Def.-App., pp 202a, 203a, 208a, 218a, 236a, 266a, 267a, et seq.) The Court instructed the jury

that it was sufficient to sustain a conviction if they found the amount of the invoices to have been over-stated (App. to Brief of Def.-App., p 269a), thus nullifying the defense which had gone to the explanation of, and justification for, the admitted inaccuracy of the invoices, and, further, advising the jury, in effect, that their purpose was to justify a conviction.

Upon appeal, the Sixth Circuit Court refused to rule upon petitioners' objections to the testimony of John Kennedy, incorporating it as fact in their opinion. It accepted the existence of the other relationships as proof of their being fraudulent, and dismissed as inconsequential the remarks of the prosecutor and the charge of the court.

A Petition for Rehearing was filed pointing out the unfair use of the statements made by an irresponsible defendant, but the Petition was denied. (Pet. for Reh., p 8) Filed herewith, for the convenience of the court, are nine copies of the Appendix to the Brief of Defendants-Appellants and of their Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

It should be unnecessary to go to the Supreme Court of the United States to obtain the fair trial guaranteed to all those accused of a crime under our system, just as it should not have been necessary to pursue this route to realize the right to vote, and to attend school. But the most noble of principles will fail if it is not applied, and as Mr. Justice Jackson has said, "The most odious of all oppressions are those which mask as justice." Krulewitch vs. U.S., 336 U.S. 440, 69 S. Ct. 716, 725, 93 L. Ed. 790.

The opinion of the Sixth Circuit Court of Appeals in this matter fails to apply, is in opposition to, and is in violation of, the opinions of this court in Viereck vs. U.S., 318 U.S. 236, 63 S. Ct. 561, 87 L. Ed. 734; Krulewitch vs U.S., ibid.; Berger vs U.S., 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314; U.S. vs Atkinson, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555; N.Y.C. vs Johnson, 279 U.S. 310, 49 S. Ct. 300, 73 L. Ed. 706.

The opinion also decided, in a manner not consistent with the foregoing opinions, two federal questions which have not been, but should be, decided by this court. The decision sanctions such a departure from the accepted and usual course of judicial proceedings as to require an exercise of the supervisory power of this court. It expands the application of the Mail Fraud Statute beyond the intention of Congress, beyond all previous published opinions on the subject —and beyond all reason.

Fraud, within the purview of the Mail Fraud Statute, requires a wrongful purpose to injure or an intention to damage. Horman vs U.S., 116 Fed. 350, 53 C.C.A. 570, cert. den. 23 S. Ct. 841, 187 U.S. 641, 47 L. Ed. 345; Epstein vs U.S., 174 F. 2d 754; Yussem vs U.S., 8 F. 2d 6, rev'g. 2 F. 2d 163. The satisfactory performance by one party, of an authorization by another, innuring to the continuous, accepted and material benefit of the authorizing party, cannot be construed to be such fraud. Such performance is lacking in the element of wrongful intent, and it is a totally improper extension of the Mail Fraud Statute to impute to it such fraud by reason of an unorthodox invoicing procedure.

It is this extension of the Mail Fraud Statute which raises here a federal question of first instance. Did the petitioners' right to make and rely upon a contract entitle

them to rely upon that contract as an absolute defense to charges that they committed fraud in doing the otherwise legal acts which constituted performance? To find that petitioners were not entitled to rely upon their contract, and its performance, is contrary to the long line of authorities holding that good faith is an absolute defense to charges of mail fraud.

PMA specifically authorized W. R. Lichota to adjust quantities, and accepted performance under that authorization, to its substantial benefit, over a period of two years. No law precluded PMA from delegating this responsibility to petitioners, and no law precluded petitioners from accepting and discharging it. This court has ruled in Viereck vs U.S., ibid., that no man shall be subject to criminal punishment for acts which are nowhere prohibited as criminal. That the United States Postal Department subsequently disapproved of the method of preparing invoices did not make that method criminal.

A buyer is defrauded only if his promised expectations do not materialize. U.S. vs Whitmore, 97 F. Supp. 733. PMA expected, reviewed regularly, benefitted from, *and is still using* the Loan Certificate Program which it had ordered, in writing, from the petitioners. It was admitted at the trial that one man could not do this job alone, and that PMA knew and expected that W. R. Lichota would use help from some source.

In reaching its decision, the Court of Appeals refused to recognize the plain error in the summation of the prosecutor and in the charge of the court. Where plain and prejudicial error has been committed in a criminal trial, the defendant is entitled to a reversal, even if he has failed to make an ob-

jection. U.S. vs Atkinson, ibid.; McAfee vs U.S. 105 F. 2d 21, 70 App. D.C. 142; Rule 52(b) Federal Rules of Criminal Procedure, 18 U.S.C. (Appendix, p 21a) It is submitted that the refusal of the Court of Appeals to find that such plain error had been committed was an abuse of discretion.

The District Attorney denounced the petitioners' contract as a forgery made by a rubber stamp. (App. to Brief of Def.-App., pp 266a, 267a) There was no evidence upon which to predicate such a statement, and when a prosecutor denounces as perjurious, testimony which is the cornerstone of the defense of the accused, without any testimony in the record to contradict the evidence at issue, such statement becomes "unsworn testimony" in spite of the court's instructions that the argument of the District Attorney is not evidence. Stewart vs U.S., 247 F. 2d 42, 101 U.S. App. D.C. 51, applying the opinion of this court in Berger vs U.S., ibid. He also urged upon the jury the untruthful conclusion that E. F. Lichota was incapable of doing the work claimed as justification for the quantity differential. Since such improper summation is always grounds for reversal, the opinion here is contrary to the principle set forth by this court in N.Y.C. vs Johnson, ibid., and by the Courts of Appeals in Wagner vs U.S., 263 F. 2d 877; U.S. vs Tomaiolo, 249 F. 2d 683; U.S. vs Nettle, 121 F. 2d 927; Dunn vs U.S., 307 F. 2d 883, U.S. vs Spangelet, 258 F. 2d 338.

The defense was based upon the authorization and justification for the quantity differential. When the court charged the jury that "It is sufficient to form a basis for conviction if . . . the quantities of printed material . . . were . . . overstated," (App. to Brief of Def.-App., p 269a), it effectively directed the jury to disregard the defense. It has been held that a single improper statement by a prosecutor may be

grounds for reversal. Pharr vs U.S., 48 F. 2d 767. The court has at least as much effect on the jury as the prosecutor has. By this statement, petitioners were deprived of their right to trial by jury under the Due Process Clause of the Fifth Amendment to the United States Constitution, (Appendix, p 20a) since the jury was not left to determine if the quantity differential was justified. The statement also shifted the burden of proof to the petitioners by making them guilty unless they could prove their innocence. And it is certainly *not* the purpose of a criminal trial to justify a conviction; such a trial is for the purpose of determining the guilt or innocence of the accused.

Another federal question raised here for the first time is the extent of petitioners' right to rely upon the obligation of the United States government to treat them fairly, as this court has stated that it shall. Berger vs U.S., ibid. Counsel for petitioners objected strenuously when the lower court admitted the testimony of John Kennedy because it was based upon an investigation made after the conspiracy, if any, had terminated, and went to establish a crime for which petitioners had not been indicted and which was not specified in the Bill of Particulars. Under the Sixth Amendment to the Constitution of the United States, (Appendix, p 20a) it is basic that a defendant in a criminal trial is entitled to know with what crime he is charged, and the allegations and proof must correspond. Berger vs U.S., ibid.; Epstein vs U.S., ibid. Moreover, if an admission is admitted to prove intent, it must relate to similar acts. Coleman, et al. vs U.S., 167 F. 2d 837.

A theft of the missing five hundred Loan Certificates was not mentioned in the Indictment or Bill of Particulars, even though the government knew about them at the time of is-

suing the Indictment and preparing the Bill of Particulars. It is grossly improper to obtain a conviction against a defendant by showing that he has committed offenses he was not summoned into court to meet. Scheinberg vs U.S., 213 Fed. 757, Ann. Cas. 1914 D 1258; Marshal vs U.S., 197 Fed. 511, 117 C.C.A. 65.

The relationship between Artlines of Bedford and PMA had terminated before Mr. Kennedy began his investigation, which was itself completed before his conversations with W. R. Lichota. This court has said that the statements of an alleged co-conspirator, made after termination of the conspiracy, if any, are not admissible as proof of an attempt to conceal the conspiracy. Krulewitch vs U.S., ibid. The same rule should apply to written statements. Yet the District Court admitted into evidence the so-called "Mather letter" (Appendix, pp 10a-13a) which was written after the conspiracy, if any, had terminated. This letter was admitted as an attempt at concealment, for which purpose, under the foregoing authority, it was inadmissible.

As noted earlier, within a few days after the Kennedy conversations, W.R. Lichota was hospitalized for treatment of violent paranoiac delusions. This fact was well known to the prosecutor and to the investigating postal authorities. Petitioners made no claim of incompetence as a defense to the charges of fraud, asserting that they had rendered full value to PMA and were entitled to rely upon the premise that good faith is a complete defense to charges under the statute. U.S. vs Corlin, 44 F. Supp. 940. The Court of Appeals refused to rule upon the admissibility of the Kennedy testimony, and the Court, on Petition for Rehearing, also refused to consider the bad faith of the prosecution in obtaining a conviction based upon the implications to be drawn

from a statement about a different offense, made by the petitioner at a time when he was not responsible for such a statement. This is the second federal question raised here for the first time; were the petitioners entitled to rely upon the obligation of the prosecution to treat them fairly? And further, did the knowing use of the statement by the prosecutor violate that obligation of fairness? We believe that it did.

While evidence of similar offenses may be submitted, it was grossly prejudicial error to introduce evidence of petitioners' other business relationships with PMA when such evidence consisted solely of a showing that such relationships existed and that payment had been rendered in connection therewith. There was no showing that the relationships had been improper or that the services for which payment was made had not been rendered. As noted in the Coleman case, ibid., to be used for this purpose, the evidence proffered must deal with a "similar offense." To use the collateral relationships in this matter as evidence of fraud by reason of its very existence is again to make a crime of that which is not criminal. This court has ruled in Viereck vs U.S., ibid., that no man shall be subject to criminal punishment for conduct not prohibited as criminal. It must follow that no man shall be convicted by implying criminal intent from the commission of acts which are nowhere prohibited as criminal.

It is freely admitted that E. F. Lichota used additional names to identify different types of services and to give the business the appearance of being larger than it really was. But overstatement of the size of one's business is not a scheme to defraud. Faulkner vs U.S., 157 Fed. 840. And the use of fictitious names in a lawful business is not an offense

within the statute. U.S. vs Smith, 45 Fed. 561. Moreover, any actual non-disclosure of the family relationships and ownership of these businesses would not make fraudulent conduct which was otherwise proper. Epstein vs U.S., ibid.

Petitioners were advised by the postal authorities that the government rarely loses a prosecution for mail fraud. There is nothing in the Act of Congress or in the published opinions of this court to indicate that the same rules of law and evidence do not apply to prosecutions for violation of this statute as are applicable in other criminal trials. Yet those rules were not applied to protect the petitioners, and if this decision is allowed to stand, it will be a dangerous precedent for discrimination against those who stand accused of the particular crime of mail fraud.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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EXHIBIT A

Nos. 16176-7

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM R. LICHOTA,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDITH F. LICHOTA,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided September 30, 1965.

Before: CECIL,* O'SULLIVAN and PHILLIPS, Circuit Judges.

PHILLIPS, Circuit Judge. Defendants-appellants are husband and wife and both are licensed attorneys of the Ohio bar, having resided at Twinsburg, Ohio, during the period involved in this case. They were indicted on three substan-

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* Honorable Lester L. Cecil became Senior Circuit Judge on August 1, 1965, and has since been sitting on the Court by assignment.

[1] "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be

tive counts of mail fraud in violation of 18 U.S.S. § 1341[1] and one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. The jury returned a verdict of guilty as to both defendants on all four counts. The district judge suspended sentence and ordered probation for one year. Both defendants have appealed.

It is urged on behalf of defendants that the district court should have granted their motion for a directed verdict of acquittal at the close of all the evidence. The principal question presented on this appeal is whether there is substantial competent evidence in the record to support the verdict of the jury. The disposition of this question requires that we make a somewhat detailed summary of the evidence.

In 1957 William Lichota was employed by Pure Milk Association, hereinafter referred to as PMA, of Chicago, Illinois, to do legal work on a full-time salaried basis. His title was director of special services.

PMA is an agricultural cooperative association of about 12,000 dairy farmers who live within a radius of 150 miles of Chicago. It is engaged in the business of receiving, processing and marketing milk produced by its member dairies.

The record shows that through the use of fictitious names of individuals, companies and firms, of which the defendants were a part, they contracted printing work for PMA and

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or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

issued false invoices to the association which Mr. Lichota authorized to be paid. The defendants were the recipients of gain on these false invoices.

During the time of Mr. Lichota's employment, PMA acquired two additional dairy cooperatives which became divisions of the association. To effectuate this expansion, PMA determined that it would issue loan certificates, a type of debenture, which would be exchanged with farmers owning stock in the acquired cooperatives and which would be sold to PMA members and employees to obtain operating capital.

Mr. Lichota was secretary of the planning committee of the board of directors of PMA and was placed in charge of the loan certificate program. His position was one of responsibility and trust. During the course of this loan certificate program he became aware of the necessity for considerable amounts of printed materials. In December 1958, he told the general manager of PMA that he, Lichota, could get a better price for the printing of the loan certificates from a company located in the Cleveland area, with which he was acquainted.

The responsibility for the printing of loan certificates and the receiving and accounting for them was then placed in the hands of Mr. Lichota. Additionally, in his position as director of the loan certificate program, he would suggest the printing of brochures and other promotional materials and represented that he could get them printed more cheaply in Cleveland. Approved materials would then be turned over to Mr. Lichota to arrange for the printing, rather than having the printing contracted for directly through PMA's purchasing department.

Contemporaneously with Mr. Lichota's representations to PMA concerning his knowledge of lower printing prices in

Cleveland, Mrs. Lichota rented a post office box at Bedford, Ohio, nine miles from the residence of defendants. This box was rented in the name of "Artlines of Bedford." Mrs. Lichota presented signature cards to the postal clerk showing that Lucille Beznoska, Mr. Lichota's mother, and "Lawrence Bradford" were authorized to receive mail. Mrs. Lichota admitted that she used the fictitious name, "Lawrence Bradford," with the explanation that a masculine name was chosen because people were more likely to deal with a man. Mrs. Lichota also admitted the use of the name "Miss Gordan" in connection with the business, purportedly as secretary, explaining that this was done for the purpose of giving the business some additional prestige. Evidence also was introduced that office space was rented for the business for the same reason.

During the period from June 1959 and through February 1960, at least twenty-four separate orders were placed by PMA with Artlines. Artlines had no printing equipment but subcontracted with the Lincoln Press in Bedford, Ohio, to do all printing work. The owner of the Lincoln Press testified that one or both of the Lichotas placed the orders and picked up the printed materials and that he knew them only as "Bradfords." Mr. Lichota denied that he ever used the name "Bradford."

In January 1959, a bank account was opened at a branch of the Cleveland Trust Company under the name "Artlines of Bedford." The names of Lawrence Bradford and Lucille Bradford were listed on signature cards as being authorized to draw checks. Mr. Lichota testified that his mother used the name Lucille Bradford because of the difficulty of the name Lucille Beznoska. The mother did not testify.

When the Lichotas received the printing from Lincoln Press, they would prepare invoices in the name of Artlines

and submit them to PMA. It is uncontradicted that the quantities of printed materials delivered were overstated on the invoices and the prices charged to PMA were substantially higher than the charges made to Artlines by Lincoln Press.

Mr. Lichota admitted that he never disclosed to anyone at PMA that he and his wife were associated with Artlines or that the principal customer of Artlines was PMA. The only other customers of Artlines disclosed by the evidence were three other enterprises created and controlled by defendants under the names of Hellman and Connors, Midwest Office Service Company and Elton Investment Company, to which further reference will be made hereafter in this opinion. PMA's general manager testified that he was never told of the relationship and that he was not aware that Artlines was created or operated by the Lichotas. Mr. Lichota undertook to justify his failure to disclose his relationship by explaining that he was "not asked."

The defendants entered into evidence an unverified photostatic copy of a purported executed power of attorney contract[2] between PMA and W. R. Lichota which undertook to confer certain powers as set forth in the instrument.

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[2] "Know all Men by these Presents that Pure Milk Association, 343 South Dearborn Street of the City of Chicago County of Cook in the State of Illinois has made, constituted and appointed, and BY THESE PRESENTS does make, constitute and appoint W. R. Lichota of the City of Chicago County of Cook and State of Illinois true and lawful ATTORNEY for it and in its name, place and stead to further engage Artlines of Bedford to develop a complete sales promotion program for Loan Certificates, including all prospectuses, mailouts, brochures and Loan Certificate forms. Artlines to furnish all advertising copy, photographic work, art design, layout, the special cartoon program, paper stock, and shipping to Chicago. E. F. Lichota to have use of our Chicago office and access to all our plants, but will do no work for our competitors and surrenders all ownership, copyright and trademark rights in any material furnished. W. R. Lichota given full

Defendants strongly rely upon this power of attorney for the various actions taken by them on behalf of PMA.

Three of the persons whose names appear on the power of attorney, PMA president, Avery Vose, witness Timothy Morgan and Notary Public Vivien A. Cox, were not called to testify concerning this document. Chester W. Bolcum, Jr., whose name appears as a signer of the document in his capacity as PMA secretary-treasurer, testified that he did not remember ever seeing or signing the document, although he believed this to be his signature and he believed it to be the signature of Avery Vose. He further stated that he had

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discretionary authority to amend the size of the program quantity, or quality of program based on size of budget plus supplementary appropriations. Elton Trust to control L. C. price levels, secure outside office services and to pay to undersigned 2/3 of net profits on security transactions, giving and granting unto the said ATTORNEY full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as it might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that the said ATTORNEY or Agent substitute shall lawfully do or cause to be done by virtue hereof.

"In Testimony Whereof, we have hereunto set our hand and seal this ——— day of May, 1959.

"Signed, Sealed and Delivered in Presence of /s/ Timothy Morgan, /s/ A. L. McWilliams, /s/ Avery A. Vose, President, /s/ Chester W. Bolcum, Jr., Secretary.

"State of Illinois, County of Cook, ss

"I, Vivien A. Cox, Notary Public in and for, and residing in the said County, in the State aforesaid, DO HEREBY CERTIFY, that Avery Vose, President and Chester W. Bolcum, Jr., Secy-Trea. personally known to me to be the same persons whose names subscribed to the foregoing Instrument appeared before me this day in person and acknowledged that they signed, sealed and delivered the said Instrument as their free and voluntary act, for the uses and purposes therein set forth.

"Given under my hand and notarial seal, this Eleventh day of May, A.D. 1959.

"/s/ Vivien A. Cox, Notary Public,

"My Commission Expires September 30, 196?."

met Mrs. Lichota once or twice at annual meetings of PMA and that he did not know if she ever did any work for PMA. A. L. McWilliams, general manager of PMA, whose name appears as a witness to the power of attorney, denied ever meeting or hearing of Mrs. Lichota or of having seen or signed this document. He did testify, however, that it appeared to be his signature and that he believed the document had been executed since the names appeared thereon. The Secretary of the PMA Board of Directors, who was the person charged with keeping company records, was unable to produce the original or a copy of the document.

The validity of this purported power of attorney contract was questioned during the trial, but no satisfactory explanation appears in the record as to the failure of defendants to produce the original of the instrument, rather than a copy, or as to the failure to produce as a witness the notary public who is shown to have notarized the instrument.

The printed materials and invoices described above were delivered to Mr. Lichota in his capacity as an employee of PMA. In each case Mr. Lichota approved the invoices for payment by writing thereon the words, "Please pay, W. R. Lichota."

The proof further discloses other related dealings involving defendants and PMA. Mr. Lichota admitted that he or Mrs. Lichota conceived the idea of representing to PMA the existence of a law firm by the name of Hellman and Connors; that there were no such persons as Hellman or Connors and no law firm by that name; that he brought the name of this fictitious firm to the attention of PMA for the purpose of enabling Hellman and Connors to handle the development of trademarks which were coincident to the printing program that was being taken on by Artlines; and that he approved payments of three or four thousand dollars to the firm. In defense of these acts, Mr. Lichota contended

that disclosure as to the identity of the fictitious law firm was made on "the first trademark."[3]

Mr. Bolcum stated that he did not remember signing the document quoted in the third footnote, or ever having seen it; that he did not know whether or not anybody by the name of Hellman and Connors existed; that he had never seen them, nor could he recall having any business dealings with them; and that in fact he did not understand the document.

Mr. Lichota further stated that two offices were operated under the name of Midwest Office Service Company, one by his mother at her home, and the second by "a man who I represented," operating from a hotel room in Chicago; that the purpose of both of these enterprises was to render office, typing, stenographic and clerical services; that PMA work was channeled to these businesses; that he possibly approved fees to be paid by PMA to Midwest Office Service

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[3] Apparently the registration set forth below is what is meant by this testimony.

"U. S. Department of Commerce
"United States Patent Office
"January 2, 1963

"THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the Power of Attorney, forming part of the Trademark Application filed April 24, 1959, by the Pure Milk Association, Serial Number 72,230, for Marketing and Distribution of Milk, Milk Products, and Dairy Products.

"By the authority of the COMMISSIONER OF PATENTS
"/s/ W. G. Lanham, Jr., Certifying Officer".

Attached thereto is the following letter:

"TO THE COMMISSIONER OF PATENTS:

"Please recognize the firm of Hellman and Connors, a firm composed solely of Edith F. Lichota, a member of the Bar of the State of Ohio, with offices at Box 57, Solon, Ohio, to prosecute this application, to transact all business in connection therewith, and to receive the certificate.

"/s/ C. W. Bolcum, Jr., For the Pure Milk Association,
343 South Dearborn Street, Chicago 4, Illinois"

Company in Chicago for something like $4,000 but the only thing he received was a legal fee of $125 for organizing the Chicago company; that his mother received part of the proceeds paid by PMA to Midwest in Chicago; and that his relationship with Midwest was disclosed under the power of attorney contract. It is to be noted that Midwest is not mentioned in the power of attorney document (footnote 2).

Still another Lichota family enterprise created for the purpose of dealing with PMA was known as Elton Investment Company. In its effort to sell loan certificates, PMA at one time gave consideration to a plan to place in the hands of Mr. Lichota the sum of $25,000 and to set him up as broker so as to provide a "secondary market" for loan certificates. After this proposal had been discarded, Mr. Lichota formed Elton Investment Company in order to provide the needed "secondary market." This "investment company" is represented to have been owned by Mr. Lichota's mother, who, as heretofore stated, did not testify as a witness. The address of Elton was given at a post office box at Solon, Ohio. Defendants acted on behalf of Elton at the same time that Mr. Lichota was serving as a full-time paid employee of PMA. As with Artlines, Midwest and Hellman and Connors, Mr. Lichota never disclosed to PMA his family relationship with Elton or the true identity of the ownership of this "investment company."

PMA adopted a proposal designating Elton Investment Company as exclusive agent to buy loan certificates at fifty per cent of face value. Elton purchased a substantial number of these certificates. A notice was mailed to the stockholders of one of the cooperatives stating that Elton would buy their certificates.

There was introduced in evidence a letter from Elton to PMA signed by one "R. S. Mather," also a fictitious name.

This letter apparently was written by one of the defendants.[4]

Subsequently, after finding that Mr. Lichota was spearheading a proxy fight to gain control of the Association, PMA dismissed him. An investigator was hired to conduct an inquiry of Mr. Lichota and the relationships hereinabove described then came to light.

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[4] "ELTON INVESTMENT COMPANY
'Solon's Largest Investment Service'
Box 96
Solon, Ohio

February 13, 1961

"The Pure Milk Association
343 South Dearborn Street
Chicago 4, Illinois

"Gentlemen:

"On Saturday, February 11, we had dinner with your Mr. Lichota. We were advised that, at least for the present, you would no longer refer holders of Loan Certificates, and/or stock convertible to Loan Certificates, to us when such holders were desirous of selling their certificates. We have not yet conferred with our attorneys. Nor have we discussed the matter with our senior investment officer because he is momentarily in Florida. But we have concluded that this decision represents a major policy departure by the Pure Milk Association for the reason that we were under the impression that the Pure Milk Association was actively seeking a market for the sale of its Loan Certificates. In reliance upon your request for the purchase of your Loan Certificates, we have authorized brokerage companies and attorneys to purchase Loan Certificates, and/or stock convertible to Loan Certificates, at prices announced to you in our letter of January 10, 1961. In pursuance of that January 10 letter, we have already expended some $1,100.00 for printing of forms, postage and stamped envelopes, envelope stuffing and addressing. Commitments on our behalf have already been made, and, in fact, we have paid for stock and Loan Certificates as of this date. It now becomes exceedingly impractical for us to shift again at your whim, for we feel that, in many instances, we are legally bound, and unquestionably, morally bound, to honor our agreements.

"We think this is a tardy time for the Pure Milk Association to make so radical a policy departure which affects our agreements. We would not try to compel your cooperation, but we shall make a thorough reappraisal of your situation. We have held investments

Evidence was introduced to the effect that 500 loan certificates were missing. The investigator testified that Mr. Lichota told him that he had 500 unused PMA loan certificates in his possession which he was keeping as "his ace in the hole" in negotiating with PMA. Mr. Lichota admitted

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in the Pure Milk Association, and in the stock of companies acquired by the Pure Milk Association, since early in 1958, and we have at no time attempted to influence or control the policies of the Association. In all this period, we have never received a single financial statement with regard to the operations of the Association. You are, of course, aware that the corporate law in the State of Illinois does not relieve a corporation from the duty of furnishing periodic financial reports to its investors. We expect that you will furnish to us appropriate financial reports directly.

"In the past we have availed ourselves of various private credit reports. While these reports have been meager, they have raised a number of points for consideration, the most significant of which was the right of the Association to create a senior secured debt, secured by mortgage, with the St. Paul Bank For Cooperatives, without the consent of the Loan Certificate holders who are presently creditors of the Association. Our attorneys advise us that this is especially true of the E and I series which have a preferred status as a result of the Dairyland merger.

"The radical departure of the Pure Milk Association from the area of powdered milk manufacture to the field of milk distribution is certainly a marked digression from the original corporate purposes, and the further question has arisen as to whether or not this can be done legally without the consent of the Loan Certificate holders.

"The continued financial reverses which have been characteristic of your operations, and which have resulted in the loss of your Dun and Bradstreet rating have been of no small concern to us.

"Periodically, we have met with your Mr. Lichota, both in Chicago at your office, and in Cleveland, and we have been reasonably well satisfied with his explanations of your operations and management endeavors. Because of the fact that we know Mr. Lichota and respect both his integrity and judgment, we have not asked for many of the certified documents and other data to which we are entitled as investors. Rest assured, however, that now we shall move to protect our rights fully. As we understand it, Mr. Lichota was authorized by your Board of Directors to 'find a market for Loan Certificates,' so that this change of policy which has just been communicated to us is one dictated by the management and contrary to the expressed policy of the Board of Directors. We have relied upon Mr. Lichota's authorization from the Board. Some of our associates, who though

making such representations to the investigator, but denied that he actually had the certificates, saying that he was using this as a "bargaining point."

When questioned by the investigator, Mr. Lichota at first denied that he had ever been at Artlines of Bedford or that he knew the identity of Lawrence Bradford.

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not connected with us have met your Mr. C. W. Bolcum, agree with us that he is an individual worthy of our confidence in his integrity and competence. The failure of management to act in accordance with the stated will of your Board of Directors, is to us, cause for grave concern. This concern is heightened by the failure of your management to furnish us with the proper financial statements. The loss of your top rating with Dun and Bradstreet would seem to indicate that this concern is shared by others.

"As an investment trust, we do not shift our investments indiscriminately, and frankly, our investment committee is largely in Florida at the present time. Consequently, without compelling reasons for doing so, we are reluctant to make a change in our position or policy at this time. For tax reasons, we are disinclined to convert stock we hold into Loan Certificates merely to become holders of record, and we consider this to be within our legal rights.

"I am not able to understand why a problem exists between us and the Pure Milk Association. A short time ago, your Pure Milk Association authorized us to buy for them, Loan Certificates at the rate of $.50 on the $1.00 of principal amount. We have offered $.80 on the $1.00 for the particular series for which you offered $.50. Is it not the policy of the Association to obtain for its Loan Certificate holders the best price available for their holdings? Or is it your policy to discourage investors and thus artificially depress prices so that some insiders can make bargain purchases? If this latter applies, you are responsible for creating an extremely unhealthy and suspect market. You realize that such a situation is contrary to the Illinois Cooperative Act, and particularly in violation of the Securities Laws of the State of Illinois. In fact, the purposeful conduct with this end in view will create a personal liability upon the directors and officers of your corporation. If this situation exists, we will move immediately to suspend all further purchases, dispose of our holdings, and take such remedial action as our attorneys might advise.

"Certainly our motives have always been above reproach, and our conduct will bear any kind of scrutiny that you care to give it. It is true that we are making investments in other cooperatives in your area of operations, and no action by the Pure Milk Association will dissuade us as this activity is wholly unrelated to your enterprise. It

The four counts of the indictment on which defendants were convicted are summarized in the margin.[5]

described in the indictments represented nothing more than

Without lengthening this opinion with further details,

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is contemplated that we shall be in the milk business, indirectly, in a substantial fashion with or without the approval of the Pure Milk Association. In some instances, we undoubtedly shall be financing competitors of yours.

"In conclusion, we view your alarm as being unfounded unless there is something on your part which has been hidden from view and will not bear examination. It must be obvious to you, as it is to us, that someone is making a mountain out of a molehill. Without compelling cause, we certainly do not contemplate any legal action against the association, as we are satisfied with Mr. Lichota's explanations. If, however, you or your organization are determined to go to court about something, we will make no attempt to discourage you. Be advised that upon receipt of your notification of intent to do so, we will furnish to you, by return mail, the name of our agent for the service of process, and his addres. We are disinclined to embark upon, or entertain, legal actions without very good cause. But if you have, in your estimation, such cause, by all means pursue it, as we will see the proceedings to a final conclusion and make a thorough investigation of your affairs in so doing. I am authorized to advise you that we shall engage you in any legal action *which you initiate*, and we shall carry our fight, if necessary, to the membership itself. If you wish to make a proposal of contest at your annual meeting, please advise us directly so that we can arrange for counsel at that time.

"As we see it, the initiative is yours.

"Very truly yours,
Elton Investment Company
By R. S. Mather

cc: A. M. McWilliams
C. W. Bolcum
W. R. Lichota"

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[5] Count one charged that on November 5, 1959, 6,000 F Series loan certificates and 6,000 J Series loan certificates were printed by the Lincoln Press for Artlines at a total cost of $892.00. The invoice submitted by Artlines to PMA charged for 10,000 Series F certificates at the rate of $1,545.80. A check for this amount was issued by the Dairyland Division of PMA at Juneau, Wisconsin, and mailed to Artlines.

Count two involves payment for 10,000 J Series loan certificates referred to in count one. The invoice submitted to PMA was for

suffice it to say that we find substantial evidence in the record supporting the jury's verdict of guilty on these four counts of the indictment.

The defense was based primarily upon good faith and lack of intent to defraud. Defendants contended in the district court and maintain in this court that the overcharges reasonable compensation for services rendered in the form of art work and legal work and principally compensation for the valuable services of Mrs. Lichota. It is asserted that defendants had no intent to defraud PMA; that their services were performed in utmost good faith; that Artlines of Bedford was a legitimate enterprise which rendered valuable services in return for all money paid to it; and that PMA could not have obtained these services at such a reasonable price elsewhere because of Mrs. Lichota's combined ability as a lawyer and skill as a commercial artist.

It is contended that the evidence is insufficient to support a finding by the jury of the requisite intent required to establish mail fraud, and that in any event nothing more is established than constructive fraud, which is insufficient to support a conviction.

In *Pereira* v. *United States*, 347 U.S. 1, 8, the Court stated:

> "The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a scheme to defraud and (2) the mailing of a letter, etc., for the purpose of executing the scheme."

In *United States* v. *Sorce*, 308 F.2d 299, 300-01 (C.A. 4), cert. denied, 377 U.S. 957, the Court said:

10,000 Series J certificates and priced at $1080.00. The check was also placed in the mails to Artlines.

Count three involved 10,000 loan certificates printed by Lincoln Press at the cost of $789.00 and billed to PMA in the amount of $2,166.00 for 16,500 certificates. Payment was made by mail.

The final count charged conspiracy to commit the offenses enumerated in the first three counts.

"In order to support a conviction under the mail fraud statute, 18 U.S.C.A. § 1341, it is not necessary that the false representations were themselves transmitted by mail, nor that the defendant personally received the mail from his victim. It is sufficient that the use of the mails was caused by the defendant in furtherance of his fraudulent scheme."

The Court in *Beck* v. *United States,* 305 F.2d 595, 598, cert. denied, 371 U.S. 890, said:

"In this case there were two essential elements of proof for the government to meet in making a submissible case, (1) the existence of a scheme or artifice to defraud or for the obtaining of money by means of false pretenses, representations or promises, and (2) the use of the United States mails in furtherance of such scheme or artifice. * * * Such proof may be made by either direct or circumstantial evidence."

Proof of a scheme to defraud involves the establishment of the element of intent. In *Silverman* v. *United States,* 213 F.2d 405, 407 (C.A. 5), cert. denied, 348 U.S. 828, the Court said. "[T]he law is well settled that, if a scheme is devised with the *intent* to defraud. . . ." (emphasis added); and in *Beck* v. *United States, supra,* 305 F.2d 595, 599 (C.A. 10), cert. denied, 371 U.S. 890, the Court said. "*[I]ntent to defraud* the purchasers of the knitting machines was an essential element." (emphasis added) This Court in *United States* v. *Rabinowitz,* 327 F.2d 62, 76-7 (C.A. 6) said:

"In every mail fraud case, there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded. * * * The scheme to defraud *must have included the intent* to do so. Even if the statements complained of were false, defendants *must have known* them to be false and they *must have intended to defraud* in order to be found guilty." (Emphasis added.)

It is equally well settled that questions of intent and good faith are for the jury. In *Silverman* v. *United States, supra,*

213 F.2d 405, 407, cert. denied 348 U.S. 828, the Court said:

> "Whether the acts of appellant showed beyond every reasonable doubt a scheme and intent to defraud as charged in the indictment was a question for the jury; and we think that we would not be justified in disturbing the verdict of the jury."

In *Stone* v. *United States*, 113 F.2d 70, 74-5 (C. A. 6), this Court stated:

> "Of course, in every agreement like these charged, there must be an intent on the part of the person who attempts or performs it, to do that which is unlawful. A question of intent usually resolves itself into one of fact. We arrive at one's intention by taking hold of certain circumstances, extraneous though they may be, and reasoning out the purpose in doing the act. It is a mental process, but a *man's intention is really a question of fact to be arrived at by the trier of the facts* in the exercise of reasonable discretion, after considering all the circumstances connected with the act charged." (Emphasis added.)

In *Henderson* v. *United States*, 202 F.2d 400, 403 (C.A. 6), this Court said:

> "Direct proof of willful intent is not necessary. It may be inferred from the acts of the parties, and such inference may arise from a combination of the acts, although each act standing by itself may seem unimportant. It is a question of fact to be determined by the jury from all the circumstances. Battjes v. United States, 6 Cir., 172 F.2d 1, 3."

See also *Henderson* v. *United States*, 218 F.2d 14 (C.A. 6), cert. denied, 349 U.S. 920, rehearing denied, 349 U.S. 969; *Coleman* v. *United States*, 167 F.2d 837, 839 (C.A. 5).

In considering the issue as to the sufficiency of evidence, we are required to view the evidence as well as the inferences properly deducible therefrom in the most favorable

light to the government. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Salter*, 346 F.2d 509, (C.A. 6); *United States* v. *Decker*, 304 F.2d 702, 705 (C.A. 6).

As in all criminal cases, guilt beyond a reasonable doubt must be established. In the present case, from the facts as above set out, we hold that there was evidence suffcient for a jury to determine that the defendants had the requisite intent to defraud PMA and were guilty beyond a reasonable doubt. We are unable to say, tested under the above stated well-established principles, that the issues were improperly submitted to the jury or that the jury did not return a permissible verdict. To the contrary, we find that there was substantial evidence supporting the verdict.

It is further contended that if any fraud is established by the evidence, it was nothing more than constructive fraud and that the conviction must be reversed under the holding of this Court in *Epstein* v. *United States*, 174 F.2d 754, 765-66 (C.A. 6), in which we said:

> "Courts speak of actual or active fraud as contrasted with constructive fraud. Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud. (Citations omitted.) To constitute actual fraud, there must be such a fraud as affects the conscience. (Citations omitted.) Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injury public interests. (Citations omitted.) Constructive fraud may be found merely from the relation of the parties to a transaction or from circumstances and surroundings under which it

takes place. (Citation omitted.) It is said that constructive fraud is a term that means, essentially, nothing more than the receipt and retention of unmerited benefits. (Citation omitted.)"

In *Cacy* v. *United States,* 298 F.2d 227, 229 (C.A. 9), the Court held that: "Deceitful concealment of material facts is not constructive fraud but actual fraud." In *Henderson* v. *United States, supra,* 202 F.2d 400, 404-5 (C.A. 6), we said:

> "A scheme to defraud within the meaning of the statute may exist although no misrepresentation of fact is made.
>
> • • •
>
> "In order to come within the terms of the statute, it is not necessary that the victim be deceived. The offense is committed when the scheme has been devised, and in pursuance of it the mail has been used."

In *Linden* v. *United States,* 254 F.2d 560 (C.A. 4), the Court said:

> "The known misleading tendency of a scheme is indicative of the defendants' criminal intent, and the trier of the facts may reasonably in such circumstances apply the presumption, founded upon common experience and recognized in law, that a person intends the consequences of his acts." 254 F.2d at 566.
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> • • •
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> "Deception is not necessarily confined to a direct statement of fact. Not words alone, but their arrangement, and the manner of their display, and the circumstances in which they are used, may create an appearance, which is false and deceptive, even though the words themselves fall short of this. Sometimes circumstances are more eloquent than words, and they impart their meaning to the word used. 7 Wigmore, Evidence (1940), Sec. 1969, p. 109; Silverman v. United States, 5 Cir., 1954, 213 F.2d 405, 407." 254 F.2d at 568.

We find that the evidence hereinabove summarized supports the holding of the jury that defendants were guilty of actual fraud, as distinguished from constructive fraud, and that *Epstein* v. *United States, supra,* is distinguishable on its facts from the present case.

It is contended that the district court committed reversible error in his charge to the jury. No objection was made to the charge as given. Failure to object to the charge precludes the raising of this question on appeal. *United States* v. *Salter, supra,* 346 F.2d 509 (C.A. 6); *United States* v. *Decker,* 304 F.2d 702, 705 (C.A. 6); Rule 30, Fed. R. Crim. P.

Complaint also is asserted as to the argument of the district attorney to the jury. No objection was expressed to any part of this argument at the time it was made. We have read the entire argument and find no plain error within the contemplation of Rule 52(b), Fed. R. Crim. P. or the holding of this court in *United States* v. *Graham,* 325 F.2d 922 (C.A. 6). See Annotation, 50 A.L.R.2d 766.

Numerous other errors are charged, including the admissibility of evidence, an alleged fatal variance between the indictment and the bill of particulars and the evidence, and failure of the district court to direct a verdict of acquittal. All of these contentions have been considered and are found to be without merit.

The judgment of the district court is affirmed.

EXHIBIT B

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

CONSTITUTIONAL PROVISIONS

1. "No person shall . . . be deprived of life, liberty or property, without due process of law." United States Constitution, Fifth Amendment.

2. "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him. . ." United States Constitution, Sixth Amendment.

STATUTES

1. "Whoever, having devised or intending to devise a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both." Title 18, U.S.C. Section 1341, June 25, 1948, c.645, 62 Stat. 763, amended May 24, 1949, c. 139, Section 34, 63 Stat. 94.

2. "If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or im-

prisoned not more than five years, or both. . ." Title 18, U.S.C., Section 371, June 25, 1948, c. 645, 62 Stat. 701.

FEDERAL RULES

1. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52(b), Title 18, U.S.C., Federal Rules of Criminal Procedure.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 828

WILLIAM R. LICHOTA AND EDITH F. LICHOTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Ohio, petitioners were convicted of mail fraud and conspiracy to commit mail fraud, in violation of 18 U.S.C. 1341 and 371. The indictment charged petitioners with a scheme to obtain money by false pretenses from the Pure Milk Association ("P.M.A.") by using Mr. Lichota's position as an employee of the association to obtain orders for a printing company created by the Lichotas, which had no employees or printing equipment, and by submitting false invoices in the name of the printing company, which Mr. Lichota authorized P.M.A. to

798-848—66

pay (D.A. 7a–13a).[1] Petitioners were given suspended sentences and placed on probation for one year. The court of appeals affirmed (Pet. App. 1a–19a; 351 F. 2d 81).

1. Petitioners' main contention is that the evidence was insufficient to show fraudulent intent. This question was correctly resolved by the court below, after careful consideration of the record, and does not warrant further review.

The evidence showed that petitioners, husband and wife, were members of the Ohio bar (D.A. 173a–174a). In 1957, Mr. Lichota was hired by P.M.A. on a full-time salaried basis to handle miscellaneous legal work (G.A. 6b) and was placed in charge of its loan certificate program, which was designed to obtain capital to effectuate certain mergers (G.A. 6b–8b). In December 1958, Mr. Lichota represented to association officials that he could arrange for the printing of loan certificates, brochures and promotional material at good prices with a company in the Cleveland area (G.A. 8b–9b; D.A. 41a). He said nothing about the ownership of this company (D.A. 55a). Also in December 1958, Mrs. Lichota rented a post office box at Bedford, Ohio, in the name of "Art-Lines of Bedford," with Lucille Beznoska (Mr. Lichota's mother) and "Lawrence Bradford" (a fictitious name) authorized to receive mail (G.A. 2b–4b). In January 1959, a bank account was opened under the name of "Art-Lines of Bedford," with "Lawrence Bradford" and "Lucille

[1] Record references are to the appendices to briefs filed in the court below—"D.A." to that of the defendants and "G.A." to that of the government.

Bradford" authorized to draw checks (G.A. 33b–35b).

Between June 1959 and February 1960, P.M.A., acting upon Mr. Lichota's representations, placed at least twenty-four orders with Artlines (see Pet. App. 4a). Petitioners had the work on these orders done by the Lincoln Press, at which they were known only as the "Bradfords" (G.A. 15b–19b). They then prepared invoices for the jobs in the name of Artlines and submitted them to P.M.A. The quantities of materials actually printed by Lincoln Press and delivered to P.M.A. were overstated on the invoices, and the prices charged to P.M.A., and authorized to be paid by Mr. Lichota (G.A. 21b), were substantially higher than the charges made by Lincoln Press.[2]

As the court below properly found, the jury was entitled to find on the basis of these facts—which petitioners conceded to be true—that petitioners were engaged in a scheme to defraud P.M.A. It is well settled that the deceitful concealment of a material fact may constitute fraud. *Cacy* v. *United States,* 298 F. 2d 227, 229 (C.A. 9); *Gusow* v. *United States,* 347 F. 2d 755 (C.A. 10), certiorari denied, 382 U.S. 906.

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[2] For example, in payment of invoices submitted to it, P.M.A. issued and mailed checks to Artlines for $1545.80, ostensibly covering the cost of printing 10,000 Series F certificates (Count 1), and for $1080.00 covering the cost of 10,000 Series J loan certificates (Count 2). Actually only 6,000 loan certificates in each Series had been printed by Lincoln Press (and delivered by Artlines to P.M.A.) at a total cost to Artlines of $892.00. Similarly P.M.A. was billed, and mailed its check to Artlines, in the amount of $2,166.00 for 16,500 loan certificates, when only 10,000 loan certificates had been printed at a cost to Artlines of $789.00 (Count 3) (see G.A. 18b; 22b–25b; 27b–33b; see also G.A. 55b–60b; D.A. 139a, 200a, 206a).

And a plan to get money unfairly by obtaining and then betraying the confidence of another may be a scheme to defraud even though no falsehoods are told. *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574.

The validity of petitioners' sole defense—good faith—was likewise properly left for resolution by the jury. Petitioners contended that the overcharges on the Artlines invoices to P.M.A. represented compensation to Mrs. Lichota for legal and artistic services, which they preferred to "absorb" into the printing costs (D.A. 139a–140a, 234–237a, 252a–255a). They further contended that they were authorized to conduct their affairs in this manner by a power of attorney purportedly executed by P.M.A. (D. Ex. H, D.A. 109a; G.A. 67b; see Pet. App. 5a). But that document cannot be read as permitting petitioners to submit false statements of the quantity or cost of printed materials delivered to P.M.A. or to conceal their true relationship to Artlines. Moreover, there was substantial evidence which cast doubt on the document's authenticity.[3]

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[3] Three of the persons whose names appear as having signed the purported power of attorney—the P.M.A. president, a witness, and the notary public—were not called to testify. The only such person called by the defense, P.M.A.'s secretary-treasurer, testified that he did not remember seeing or signing the document, although the signatures thereon appeared to be his and the president's (D.A. 109a–110a). The general manager of P.M.A. likewise had no recollection of having seen or signed the document, although the signatures appeared to be his and those of other company officials (D.A. 49a–50a). The secretary of the P.M.A. board of directors, who was the keeper of company records, was unable to find either an original or a copy of the document in company files (G.A. 41b–42b).

2. There is no merit in petitioners' objection to the introduction of evidence of three other enterprises which they created and controlled: Hellman and Connors, a fictitious law firm—described by Mr. Lichota as a trade name of his wife, the Midwest Office Service, a firm performing typing and stenographic work, and the Elton Investment Company. Mr. Lichota caused P.M.A. to retain the purported law firm to handle the development of trademarks coincident to the printing work supposedly being done by Artlines and approved invoices authorizing payments to the firm of $3000 to $4000. He channelled P.M.A. typing work to Midwest and approved payment of Midwest invoices in the amount of $4000 (D.A. 169a–177a, 178a–190a). And he induced P.M.A. to designate Elton the exclusive agent to purchase P.M.A.'s loan certificates at fifty per cent of face value (D.A. 28a, 132a, 286a).[4]

The evidence in question showed that petitioners obtained money from P.M.A. through organizations contrived for that purpose, concealing their control of such organizations. It tended to establish a general pattern of conduct sufficiently similar to the transactions at issue to be admissible on the question of criminal intent. See McCormick, *Evidence* (1954

[4] Mr Lichota testified that he wrote to Elton on behalf of P.M.A. and that it was fair to assume that any reply was written by his wife or mother (D.A. 157a–159a). A letter from Elton to P.M.A. signed with the name "R. S. Mather," dated February 13, 1961, was shown to Mr. Lichota and he explained that he did not disclose the signature was fictitious because no one asked him (D.A. 161a). There is no merit in the claim (Pet. 13) that it was error to permit reference to this letter.

ed.) § 164. Moreover, most of the evidence with respect to Elton was developed by the defense for the apparent purpose of showing affirmatively that petitioners had rendered some valid services to P.M.A. (see D.A. 32a–34a; 43a–54a; 56a–57a; 109a; 128a–132a). The evidence as to Hellman and Connors and Midwest was developed by the government on cross-examination and served to impeach Mr. Lichota's testimony that the only reason he did not disclose his relationship to Artlines was that he was not asked (D.A. 169a–190a).

3. In the course of an investigation instituted by P.M.A. officials after discovering certain suspicious transactions in the loan certificate program (G.A. 10b–14b), Mr. Lichota was interviewed in April 1961 by a private investigator, who was attempting to trace missing loan certificates (see D.A. 60a, *et seq.*). At trial, the investigator gave the following account of the interview: Mr. Lichota at first said that 15,000 certificates were missing and disclaimed having any knowledge of a "Lawrence Bradford". When confronted with a photograph of himself and his wife, identified by the printer of the loan certificates as the "Lawrence Bradfords", Mr. Lichota told the investigator that he had a "powerful lot of stuff there" but that he would "fight it," adding, "I've got the ace in the hole, I've got the 500 missing certificates" (D.A. 83a). He offered to release the certificates on condition that the company agree not to press charges against him or his wife (D.A. 63a). When asked about the 15,000 certificates he had originally mentioned, Mr. Lichota admitted they had never been printed and that Artlines was his business. He said

that the additional charges on Artlines' invoices were for artwork and "things like that" done by his wife (D.A. 83a; see generally D.A. 58a–86a; G.A. 37b–40b).

The statements he made to the investigator clearly were admissible against Mr. Lichota. He did not assert at trial, as he does now, that he was incompetent at the time of the interview. Rather, Mr. Lichota's testimony confirmed in substance the private investigator's account. Indeed, he admitted on the stand that he had told the investigator he possessed the 500 missing certificates "because [the manager of P.M.A.] had something on me, and this was my only bargaining point" (D.A. 146a). Since the statements were made in an attempt to strike a bargain on behalf of Mrs. Lichota as well, they were properly admitted against both petitioners as having been made in furtherance of the conspiracy.[5] But even if the statements were inadmissible as to the wife, their introduction would have been harmless error in light of the fact that both petitioners conceded that all of the transactions admitted by Mr. Lichota to the investigator actually took place.[6]

4. Petitioners present an isolated part of the trial court's instructions completely out of context in alleg-

[5] Contrary to petitioners (Pet. 12), the statements made in April 1961 were made prior to the termination date of the conspiracy, which was alleged to have been "on or about May 1, 1961" (D.A. 11a), and at a time when Mr. Lichota was still employed by P.M.A. (see D.A. 145a).

[6] The jury was instructed to confine its consideration to offenses charged in the indictment (G.A. 49b). Contrary to petitioners (Pet. 12–13), there is no basis for believing that the jury based its verdict on the view that petitioners were guilty of theft.

ing that the court improperly instructed that an overstatement of the quantity of printed materials delivered to P.M.A. was sufficient to form a basis for conviction. The language complained of, read in context (see G.A. 51b), reveals that the court was telling the jury that the evidence need not show any overstatement or misrepresentation in any *particular amount,* but only in some *substantial amount.* The court had previously outlined the essential elements of the crime including the need for intent to defraud (G.A. 50b), and it told the jury that every essential element must be proved beyond a reasonable doubt (G.A. 53b). There was no objection to the charge at trial. See Rule 30, Fed. R. Crim. P.

5. The closing argument of the United States Attorney was also not objected to at trial. In any event, government counsel acted well within the bounds of propriety in suggesting inferences to be drawn from the testimony casting doubt on the authenticity of the power of attorney and the authorship of other documents produced and claimed to have been prepared by Mrs. Lighota (see D.A. 266a).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 828

William R. Lichota, and
Edith F. Lichota, Petitioners

vs

United States of America, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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I

PETITION FOR REHEARING

Petitioners present their petition for a rehearing of this Court's order dated January 31, 1966, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, and, in support thereof, respectfully show:

GROUNDS FOR REHEARING

I

Unless it is possible for an individual to conspire with himself, this conviction is impossible to sustain.

E. F. Lichota was convicted of mail fraud and conspiracy to commit mail fraud. Her alleged co-conspirators were W. R. Lichota and Samuel Haddad. At the commencement of trial, Mr. Haddad was dismissed, and there is not a single word in the record to indicate that he, in any way, conspired with either of the petitioners. Although available to the District Attorney, and ordered to remain at hand throughout the trial, he was not called as a witness.

At the time of the trial, Mr. Lichota had been adjudicated to be mentally incompetent by a court of competent jurisdiction. This fact was known to the United States government in whose custody he had spent considerable time at the Veterans Administration Hospital at Chillicothe, Ohio.

Under these circumstances, with whom did Mrs. Lichota conspire? Sam Haddad? If he were the conspirator, why was he neither tried nor called as a witness? W. R. Lichota—an incompetent?

Conspiracy, by its nature, requires two or more persons. These two or more persons must be sufficiently possessed of their mental faculties to form the intent which is a vital element of the crime of conspiracy.

Since Mr. Haddad is not implicated by the evidence, and Mr. Lichota was incompetent, there is no co-conspirator left who could have joined with Mrs. Lichota to commit this crime.

To obtain this conviction, the prosecuting attorney used a known incompetent for the necessary second conspirator. Then to lend an aura of legitimacy, he introduced the testimony of an investigator who was, or had been, in the pay of the United States, to relate skillfully into the record what that incompetent was supposed to have said. Thus the statements which would have been inadmissible from an incompetent, were admitted, over objection, by the testimony of one whose mental competence to testify would not be questioned.

To complete the facade of evidence that the petitioners' conduct was fraudulent, the District Attorney dismissed Mrs. Lichota's work as being of no value. The preparation of a prospectus for an original securities issue was dismissed as too difficult for this woman and simultaneously a form-filling job that any secretary could do on her coffee break. Upon this "preponderance" of the evidence, Mrs. Lichota was convicted of conspiracy to commit mail fraud.

There is one nagging question. With whom did she commit it? If there is no answer, we have sustained a conviction resting upon someone's view of the immediate ends of justice. Whenever statutes are construed and applied to ful-

fill only the immediate and desired end, without regard for the intent of the legislators, and without regard for the effect of the legal precedent being established, we wash away a society founded upon basic liberties guaranteed to all of the individuals living within that society. We live, instead, at the threshhold of a totalitarian state.

II

At the time of trial, the prosecuting witness had seized assets of the Elton Investment Company, an associate of the petitioners, and insurance settlements far in excess of all gross amounts ever paid to the petitioners or any affiliated companies. It should be apparent that, if there was a scheme involved in these proceedings, it was the scheme of the prosecuting witness to victimize the petitioners and retain this property it had seized. Its unwitting accomplice has been the federal government.

To enlist the aid of the federal government, the Pure Milk Association persuaded the Postal Department that it had been defrauded and needed its help. Without revealing the property it had seized and the insurance settlements it had obtained, the prosecuting witness amassed its political influence to pervert the function of the Postal Department and turn the District Attorney's office into a sort of super collection agency. To this very date the office of the District Attorney has no knowledge of the amount of property seized by the prosecuting witness, but that office has been used to make an unconscionable profit for the prosecuting witness in a matter which is basically a civil dispute.

There was a contractual relationship between the parties which terminated at the onset of a proxy fight for control

of the Pure Milk Association. That contractual relationship authorized and contemplated the quantity variance which is the primary basis for this conviction. If the parties contemplated such a quantity differential six months in advance of the invoices which are the subject of the indictment, then any dispute as to the treatment of such quantity differential must be a civil argument. It is a perversion of the Mail Fraud Statute to characterize the relationship as fraudulent, since the person committing a fraud rarely apprises the intended victim of the nature of the scheme in advance.

This point of view is consistent with the facts. Recently, petitioners have learned that the prosecuting witness had been itself convicted of conspiracy in a different matter by the Federal District Court in Chicago, Illinois, and the conviction was sustained on final appeal. With the investigative powers of the federal government, this prior conviction of conspiracy must have been known at the time of trial.

Thus, the defendants, whose reputations had always been exemplary, were convicted of conspiracy on the testimony of a convicted conspirator, a mental incompetent and a paid investigator who was, or had been, in the pay of the United States.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

.....

Edith F. Lichota
Counsel for Petitioners

CERTIFICATE OF COUNSEL

//I, Edith F. Lichota, counsel for the above named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

.....

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Counsel for Petitioners